Office Supreme Court
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 893.

KENNETH ALONZO TATUM,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

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Kenneth Alonzo Tatum, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered on the 21st day of November, 1962, wherein said Court affirmed the judgment of the Criminal District Court No. 2 of Harris County, Texas.

OPINIONS BELOW.

The opinions below appear:

Opinion of the Court of Criminal Appeals of Texas, entitled Kenneth Alonzo Tatum, Appellant, v. The State

of Texas, Appellee, reported in 363 S.W.2d 932. It is printed in the appendix hereto, page A1.

JURISDICTION.

The judgment of the Court of Criminal Appeals of Texas was entered on the 21st day of November, 1962, and is appended here as Appendix "A".

Petitioner's Motion for Rehearing was overruled on the 30th day of January, 1963, and is appended hereto as Appendix "B".

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1257 (3).

The Court of Criminal Appeals of Texas is not an intermediate court. It is the court of last resort in Texas in all matters within its jurisdiction. Its judgments are not reviewed by the Texas Supreme Court, or by any other Texas Court.

Petitioner objected to the admission in evidence of certain marijuana, which was obtained by police officers from a search made of the appellant and his home. Among the objections being urged were: Such evidence was illegally obtained in violation of Title 18, Sec. 3109, U.S.C.A., which is as follows: The officer may break open any outer or inner door or window of a house or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

That such evidence was illegally obtained and in violation of Art. 727a, C. C. P. of Texas, which provides that "No evidence obtained by an officer or other person in vio-

lation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

QUESTION PRESENTED.

Was the evidence used to convict the Defendant obtained and used in violation of Title 18, Section 3109, U.S.C.A.?

STATUTES INVOLVED.

Title 18, Sec. 3109, United States Code Annotated (U.S.C.A.), p. 47.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Art. 727a, Vernon's Texas Code, Crim. Proc., Vol. 2, p. 236, Cumulative Annual Pocket Part, 1962 of Texas which provides that "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

STATEMENT OF THE CASE.

The Petitioner was charged by indictment with the offense of possession of a narcotic drug to-wit: Marijuana. He was found guilty and his punishment was assessed at

confinement in the State Penitentiary for a period of ten years. At the time of the trial the Defendant objected to the introduction of evidence resulting from the search on the above grounds which the Court overruled and the Defendant duly excepted thereto (S. of F. pp. 8-14, 26, 28, 31, 37, 43, 44, 56, 58, and 66).

The Court, the State, and the Defendant agreed (S. of F. pp. 14-15-6-7 and 28) that all of the objections stated above would be considered as having been made by the Defendant by his stating that we object on the same grounds as previously stated.

The police officers on the 14th day of September, 1961, obtained a search warrant from W. C. Ragan, Justice of the Peace, Precinct No. 1, Harris County, Texas, to search the premises of the Defendant, Kenneth Alonzo Tatum, at 7326 Touchstone Street, Houston, Texas, for narcotics, narcotic paraphernelia, marijuana and barbiturates and on that day they went to the premises and commenced a search under the search warrant (S. of F. pp. 3-8) and the search warrant and return thereon.

The defendant's objections were raised in the trial court (S. of F. pp. 12-14) (This question was pursued and urged on appeal in the Court of Criminal Appeals of Texas, Brief for Appellant, pp. 4, 5-16 and was re-asserted in the Court of Criminal Appeals of Texas in the Appellant's Motion for Rehearing pp. 5-15). These objections relate to the offering of evidence obtained as a result from the search in that the officers failed to comply with the statutes and laws referred to and the requirements of such statutes and laws and the manner in which entrance was made and the search was conducted, and failure to give the proper notice as required.

Officer Pollock testified (S. of F. p. 32) that six officers went to the defendant's house after dark around 8:00 p.m., that there were six officers two of whom went to the back door and four to the front door. Officer Pollock was one of the officers that went to the front door; that he didn't knock and didn't hear or see anybody knock. That he did not make his purpose for being out there known to Kenneth Tatum and that Kenneth Tatum didn't say anything to the officers until they had already got on the inside (S. of F. p. 33).

Officer Pollock didn't see or hear anyone tell Kenneth Tatum, that they were out there with a search warrant. That he heard no one tell Kenneth Tatum that they were out there for the purpose of searching his premises or to arrest him (S. of F. p. 33).

That when he entered the premises of Kenneth Tatum, he did so with an armed pistol in his hand (S. of F. pp. 33-34-16-17); that he at least at one time testified that he thought all six officers had open pistols in their hands.

That at the entrance of the house there was a screen door that opened outward and a wooden door that opened inward (S. of F. p. 34). That the screen door was closed. Officer Strickland opened the screen door and that the wooden door was closed (S. of F. p. 34), and that the officers opened the door which was closed but unlocked (S. of F. p. 35), and went into the house.

Officer Strickland testified that this was a private residence (S. of F. p. 40) and that Kenneth Tatum was sitting on the couch (S. of F. p. 47) in the living room. That pocket dustings were taken from the Defendant's pockets at the Police Station (S. of F. p. 45). Officer Strickland testified (S. of F. p. 46) that there was a screen door and

regular door on the front of the house, and that both were closed at the time he arrived on the scene and that he did have a gun on his person. That some of the officers had cocked pistols (S. of F. p. 47). That while the officers were on the front porch they did not tell the Defendant that they were police officers (S. of F. p. 48), and that all of the officers were in plain clothes. That while the officers were still on the porch they did not tell Kenneth Tatum that they were out there with a search warrant.

That Kenneth Tatum was not told by the officers that they were out there for the purpose of searching his premises (S. of F. p. 48), before they went in. That it was only after they entered the house that they produced the search warrant (S. of F. pp. 49-51).

That Kenneth Tatum did not get up from the couch and start to run and that he never made any motion to leave (S. of F. p. 52). Officer Strickland testified that he didn't have time to get up.

Officer Stringfellow testified that he and another officer came in through the back door (S. of F. p. 59). That he didn't knock and that the screen door was closed but that they opened it and went inside. That neither he nor the other officer said anything before they went in.

Officer Baker testified that Kenneth Tatum did not say anything to the officers while they were still on the front porch (S. of F. pp. 68-69-73), and that he didn't hear the defendant say "come in" and that the officers didn't tell the Defendant what their purpose in being there was before they had gained entrance to his house. That while the officers were on the outside of the Defendant' home they didn't tell him they were police officers and didn't make known to him their purpose in being there (S. of F. p. 70) and that it was only after they had gained en-

trance to the Defendant's home that they made it known to the defendant that they had a search warrant. Officer Baker testified that this was the defendant's home (S. of F. p. 71).

The Defendant contended and still contends that the evidence was obtained and used in violation of Title 18, Section 3109, U.S.C.A., and in violation of Art. 727a, C. C. P. of Texas.

When the State rested its case the Defendant made the motion appearing in the S. of F. p. 66, which motion is as follows:

At this time we would like for the Court to instruct the jury to find the Defendant not guilty, on the grounds that the evidence was obtained in violation of Title 18, Section 3109, U.S.C.A., which reads as follows: "The officer may break open any outer or inner door or window of a house or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant".

The evidence in this case shows that these officers went out there with the purpose of executing a search warrant, and that they failed to make their purpose known to the defendant, that they were out there with a warrant and for the purpose of searching his premises, and for the purpose of arresting him.

The Court: That is overruled.

Mr. Miller: Note our exception.

Appellant timely presented the following requested instruction: "If you believe from the evidence or have a reasonable doubt that the officers or any of them although

armed with a search warrant entered the premises with a drawn pistol without giving notice that they were police officers armed with a search warrant and were there for the purpose of searching his premises and arresting him you will acquit the Defendant". Said requested instruction was refused and appellant timely and properly excepted to its refusal (Tr. pp. 12-13).

(This question was pursued and urged on appeal in the Court of Criminal Appeals of Texas, Brief for Appellant, pp. 17-18 and was re-asserted in the Court of Criminal Appeals of Texas in the Appellant's Motion for Rehearing pp. 15-16.)

In the event that the Defendant was not entitled to the motion requesting the Court to instruct the jury to find him not guilty as set out above then the evidence certainly raised a fact issue which the Court should have submitted to the jury which he refused to do and such refusal constitutes reversible error.

The Appellant timely presented the following objections to the Court's main charge to the jury and requested a proper charge thereon be given to the jury which objections were as follows:

"Defendant objects and excepts to the charge of the Court because nowhere in said charge does the Court charge the law applicable to Title 18, Section 3109, U.S.C.A.

Defendant objects and excepts to the charge of the Court because nowhere in said charge does the Court charge the law applicable to Art. 321 of the C. C. P. of the State of Texas." Said requested objections were refused and appellant timely and properly excepted to their refusal (Tr. p. 14).

(This question was pursued and urged on appeal in the Court of Criminal Appeals of Texas, Brief for Appellant, pp. 18-19 and was re-asserted in the Court of Criminal Appeals of Texas in the Appellant's Motion for Rehearing, pp. 16-17.)

In the event that the Defendant was not entitled to the motion requesting the Court to instruct the jury to find him not guilty as set out above then the evidence certainly raised a fact issue which the Court should have submitted to the jury, which he refused to do and such refusal constitutes reversible error.

Appellant timely presented the following requested instruction: "Defendant objects and excepts to the charge of the Court because nowhere in said charge does the court charge the Jury that if they believe from the evidence, or if they have a reasonable doubt thereof that the Defendant did not give his consent to the entry of his home at the time it was entered by the officers that the jury should find the Defendant *not guilty*, and so say by their verdict". Said requested instruction was refused and appellant timely and properly excepted to its refusal (Tr. p. 15).

(This question was pursued and urged on appeal in the Court of Criminal Appeals of Texas, Brief for Appellant, pp. 20-21 and was re-asserted in the Court of Criminal Appeals of Texas in the Appellant's Motion for Rehearing, pp. 17-18.)

In the event that the Defendant was not entitled to the motion requesting the Court to instruct the jury to find him not guilty as set out above then the evidence certainly raised a fact issue which the Court should have submitted to the jury which he refused to do and such refusal constitutes reversible error.

Appellant timely presented the following requested instruction: "If you believe from the evidence or have a reasonable doubt that the officers or any of them although armed with a search warrant entered the premises of Kenneth Tatum with a drawn pistol without giving notice of their authority and purpose you will acquit the defendant and by your verdict say 'not guilty' ". Said requested instruction was refused and appellant timely and properly excepted to its refusal (Tr. p. 16). (This question was pursued and urged on appeal in the Court of Criminal Appeals of Texas; Brief for Appellant, pp. 21-22 and was re-asserted in the Court of Criminal Appeals of Texas in the Appellant's Motion for Rehearing, pp. 18-19.)

In the event that the Defendant was not entitled to the motion requesting the Court to instruct the jury to find him not guilty as set out above then the evidence certainly raised a fact issue, which the Court should have submitted to the jury which he refused to do and such refusal constitutes reversible error. The Appellant timely presented the following objections to the Court's main charge to the jury and requested a proper charge thereon be given to the jury which objections were as follows:

We object to it on the grounds that the charge fails to instruct the jury that if they believe from the evidence, or have a reasonable doubt thereof, that the officers, or any of them, although armed with a search warrant, entered the premises of Kenneth Tatum with a drawn pistol, without giving notice of their authority and purpose, then they should acquit the Defendant and say by their verdict "Not guilty." (Tr. p. 18). (This question was pursued and urged on appeal in the Court of Criminal Appeals of Texas, Brief for Appellant, pp. 22-23 and was re-asserted in the Court of Criminal Appeals of Texas, in the Appellant's Motion for Rehearing pp. 19-20.)

In the event that the Defendant was not entitled to the motion requesting the Court to instruct the jury to find him not guilty as set out above then the evidence certainly raised a fact issue, which the Court should have submitted to the jury which he refused to do and such refusal constitutes reversible error.

Several officers testified that Kenneth Tatum said nothing at all prior to their gaining forced entrance into his home. No officer testified that they made their purpose known to the Defendant prior to the entrance into his home. All officers were in plain clothes; and at least one officer entered with a cocked pistol. Kenneth Tatum was not told by the officers that they were there with a search warrant for the purpose of searching his premises and arresting him until they had gained entrance into his home.

The evidence if not conclusive in favor of the defendant that the officers failed to comply with the above statutes certainly raised a question of fact that the Court should have submitted to the jury. Some proper charge to the jury was required by the holding of the Supreme Court of the United States in the case of *Miller* v. *State*, 78 S. Ct. 1190.

The Defendant not only submitted what he believed to be proper charges, but out of precaution also objected to the court's failure to charge the jury. In the case of *Wooley* v. *State*, 285 S.W.2d 219, the Court said, (3) "Appellant's requested charge was sufficient to call the Court's attention to the error in the main charge, and under the 1955 amendment to Article 659, Vernon's Ann. C. C. P., no further exception or objection to the charge was necessary to preserve the error."

REASONS FOR GRANTING THIS WRIT.

The Legislature of Texas has very carefully provided that evidence obtained in violation of the laws of the United States shall not be admissible against the accused in a criminal case. The Criminal District Court No. 2 of Harris County, Texas, refused to permit the Defendant to assert Title 18, Section 3109, U. S. C. A., as a defense to the introduction of evidence, and further held that the Defendant was not entitled to any charges to the jury relating to the manner in which entrance was made and the search was conducted and whether notice was given as required by law.

The Court of Criminal Appeals of Texas, although requested to determine whether or not the Defendant could assert Title 18, Section 3109, U.S.C.A., as a defense refused to do.

The question thus raised is substantial, important and of great public interest. It is important to all people of this nation to know whether or not a Federal Statute is applicable to proceedings in State Courts.

The evidence in this case shows that these officers went out there with the purpose of executing a search warrant, and that they failed to make their purpose known to the defendant; that they were out there with a warrant for the purpose of searching his premises, and for the purpose of arresting him, and gained entrance by using force, while armed with pistols.

A question arises as to whether or not this federal statute is applicable to State proceedings. In the case of *Schwartz v. State of Texas*, 73 S. Ct. 232, the Supreme Court of the United States said: "We are dealing here

only with the application of a federal statute to state proceedings. Without deciding, but assuming for the purposes of this case, that the telephone communications were intercepted without being authorized by the sender within the meaning of the Act, the question we have is whether these communications are barred by the federal statute, Sec. 605, from use as evidence in a criminal proceeding in a state court * * *."

Texas itself has given consideration to the admissibility of evidence obtained in violation of constitutional or statutory law and has carefully legislated concerning it. In 1925 Texas enacted a statute providing that evidence obtained in violation of the Constitution or laws of Texas or of the United States should not be admissible against the accused in a criminal case. In 1929 this Article 727a of the Texas Code of Criminal Procedure was amended to provide that evidence obtained in violation of the Constitution or laws of Texas, or the Constitution of the United States should be inadmissible in evidence, thus eliminating from the coverage of the statute evidence obtained in violation of the laws of the United States.

Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of Federal Supremacy is not lightly to be presumed.

The Schwartz case was decided on December 5, 1952. The Texas Legislature amended Art. 727a, C. C. P., to be ef-

fective June 4, 1953, to read as follows: *"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case. As amended Acts 1953, 53rd leg., p. 669, ch. 253, Sec. 1.*

Thus the Texas Legislature has very carefully legislated to include the laws of the United States and when such objection is urged by the Defendant as did Kenneth Tatum in this case it should be available to him as a defense.

In the case of *Miller* v. *United States*, 78 S. Ct. 1190, the Supreme Court of the United States said, "But the Government agrees with petitioner that the validity of the entry to execute the arrest without warrant must be tested by criteria identical with those embodied in 18 U.S.C., Sec. 3109, 18 U.S.C.A., Sec. 3109, which deals with entry to execute a search warrant. That section provides that an officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose", he is denied admittance * * *.

"From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle. As early as the 13th yearbook of Edward IV (1461-1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party. Remarks attributed to William Pitt, Earl of Chatham, on the occasion of debate in Parliament on the searches incident to the enforcement of an excise on cider, eloquently expressed the principle:

"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

But the common law recognized some authority in law officers to break the door of a dwelling to arrest for felony. The common-law authorities differ, however, as to the circumstances in which this was the case. Hawkins says: "where one lies under a probable Suspicion only, and is not indicted, it seems the better opinion at this Day, That no one can justify the Breaking open Doors in Order to apprehend him." 2 Hawkins, Pleas of the Crown, c. 14, Sec. 7 (1762); see also Foster, Crown Law (1762), 320-321 (2d ed. 1776). Coke appears to have been of the same view, and to have thought that the breaking of a house was limited to cases in which a writ, now our warrant, had issued. Co. 4th Inst. 177. On the other hand, Hale says that "A man, that arrests upon suspicion of felony, may break open doors, if the party refuse upon demand to open them * * *." 1 Hale, Pleas of the Crown, 583 (1736).

Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed to state his authority and purpose for demanding admission. The requirement was pronounced in 1603 in Semayne's Case, 5 Coke Co. Rep. 91 a, 11 E. R. C. 628, 77 Eng. Repr. 194, at 195: "In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors * * *."

The requirement stated in Semayne's Case still obtains. It is reflected in 18 U.S.C., Sec. 3109, 18 U.S.C.A., Sec. 3109, in the statutes of a large number of States, and in the American Law Institute's proposed Code of Criminal Procedure, Sec. 28. *It applies, as the Government here concedes, whether the arrest is to be made by virtue of a warrant, or when officers are authorized to make an arrest for a felony without a warrant.*

There are some state decisions holding that justification for noncompliance exists in exigent circumstances, as, for example, when the officers may in good faith believe that they or someone within are in peril of bodily harm, *Read* v. *Case*, 4 Conn. 166, or that the person to be arrested is fleeing or attempting to destroy evidence. *People* v. *Maddox*, 46 Cal. 2d 301, 294 P.2d 6.

But whether the unqualified requirements of the rule admit of an exception justifying noncompliance in exigent circumstances, is not a question we are called upon to decide in this case. The Government makes no claim here of the existence of circumstances excusing compliance. The Government concedes that compliance was required but argues that "compliance is evident from the events immediately preceding the officers' forced entry."

That rule seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case. It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture. *Cf. People* v. *Martin*, 45 Cal. 2d 755, 290 P.2d 855; Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541,

798, 802 (1924). But even by that test the evidence upon which the Government relies was not sufficient to justify the officers' failure expressly to notify the petitioner that they demanded admission to his apartment for the purpose of arresting him.

The single fact known to the officers upon which the Government relies is the "split-second" occurrence in which the petitioner evinced "instantaneous resistance to their entry," an "almost instinctive attempt to bar their entry after they (the officers) had identified themselves as police * * *." It is argued that this occurrence "certainly points up that he knew their purpose immediately * * * (and) at once realized that he had been detected and that the officers were there to arrest him": that "(i)t would be wholly unrealistic to say that the officers had not made their purpose known because they did not more formally announce that they were there to arrest him."

But, first, the fact that petitioner attempted to close the door did not of itself prove that he knew their purpose to arrest him. It was an ambiguous act. It could have been merely the expected reaction of any citizen having this experience at that hour of the morning, particularly since it does not appear that the officers were in uniform, *cf. Accarino v. United States*, *supra*, 85 U.S. App. D.C. at page 403, 179 F.2d at page 465, and the answer "'Police" was spoken "in a low voice" and might not have been heard by the petitioner so far as the officers could tell. * * *

We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures

to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage, and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in Sec. 3109 the reverence of the law for the individual's right of privacy in his house. Every householder the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.

Officer Strickland was the only officer in the entire case, who said that Kenneth Tatum, said, "come in". The effect of the holding of the Court of Criminal Appeals is that Strickland's testimony was established as a matter of law. Officer Strickland as well as all other officers except Baker were interested witnesses for the State. The State is bound by the testimony of its own witnesses and certainly Strickland's testimony was not established as a matter of law. We disagree with the Court wherein it said, "the fact that certain witnesses may not have heard certain things done and said does not constitute evidence that the same did not transpire just as Strickland had testified." That Court is in error in such holding for the law is well established that where certain witnesses testify that they did not hear a certain remark their testimony is evidence that such remark or statement was not made. 23 Tex. Jur. 2d, Sec. 144, Evidence, Page 216. Certainly where witnesses

within a few feet of a witness who testified that he heard the defendant say, "come in" say that they did not hear the defendant say "come in" a question of fact is raised as to whether or not such statement was said as the testimony of such witness does not establish that fact as a matter of law, and the fact that other witnesses testify that they did not hear such statement is sufficient to prove that such remark was not made. 23 Tex. Jur. 2d. Sec. 144, Evidence, Page 216; 24 Tex. Jur. 2d. Sec. 707, Evidence, Page 360. The Courts' of Texas refusal to deal with this question is an evasion of the defendant's rights.

In view of the foregoing, it is the appellant's contention that he has been deprived of a right, privilege, or immunity claimed by him under the statutes of the United States and the Federal Question was necessary for a determination of this case; that no adequate non-federal ground adequately supports the State's judgment.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

Respectfully submitted,

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CERTIFICATE.

I, Buck C. Miller, Attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of March, 1963, I served a copy of foregoing Petition for Writ of Certiorari on Waggoner Carr, Attorney General of Texas, Capitol Station, Austin 11, Texas, by mailing a copy in a duly addressed envelope, with first class postage prepaid, certified mail return receipt requested at the above address.

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APPENDIX "A".

Kenneth Alonzo Tatum, Appellant

No. 35,030. v. ----- Appeal from Harris County

The State of Texas, Appellee

Opinion.

The offense the possession of marijuana; the punishment, 10 years.

Officer Strickland of the narcotics division of the Houston police testified that on the night in question, in company with other officers and armed with a search warrant, he went to appellant's home; that a light was shining in the living room and, as he approached the house, he saw appellant and his wife seated on a couch; that he opened the unlocked screen door, knocked on the wooden door, and that a male voice said "Come in." He testified that as soon as he opened the front door he identified himself to appellant, handed him the search warrant which both appellant and his wife read; that he and the other officers proceeded to search appellant's home, where they found a quantity of a green plant substance in four different containers which was later identified by a chemist as 432 grams of marijuana and which was a sufficient quantity to make more than 1500 marijuana cigarettes.

Strickland's testimony was corroborated by Officers Pollock and Stringfellow, who both stated that Strickland entered first, but neither of them heard Strickland's knock on the door or appellant's invitation to enter, and Pollock admitted that his pistol was drawn as he followed the other officers into the house.

Appellant did not testify in his own behalf but called Officer Baker, who testified that Strickland identified himself at the time he opened the door; that he did not remember hearing Strickland knock on the door or hear appellant say "Come in," but explained that Strickland went in first and was already inside when he (the witness) stepped up on the porch.

Appellant's contention that the search, under the facts stated, was shown to be illegal has been recently decided adversely to him by this Court in McCown v. State, 338 S.W.2d 732, wherein we stated that we found no expression of the Supreme Court of the United States contrary to our conclusion that Article 319, V.A.C.C.P., when its terms were complied with, authorized a legal search. The affidavit for the search warrant is in the terms recently approved by this Court in Davis v. State, 302 S.W.2d 419.

As we construe the evidence set forth above, it did not require the giving of the requested instructions concerning the legality of the execution of the search warrant.

The fact that certain witnesses may not have heard certain things done and said does not constitute evidence that the same did not transpire just as Strickland had testified.

Finding the evidence sufficient to support the conviction and no reversible error appearing, the judgment is affirmed.

Morrison, Judge

(Delivered November 21, 1962)

APPENDIX "B".

COURT OF CRIMINAL APPEALS OF TEXAS
Clerk's Office

Austin, Texas Jan. 30, 1963

Dear Sir:

This is to advise that the Court has today overruled without a written opinion the Appellant's Motion for Rehearing in Cause No. 35,030 Kenneth Lonzo Tatum

vs.

State of Texas

Your's truly,

s/ Glenn Haynes, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 893

KENNETH ALONZO TATUM,
Petitioner

v.

STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

JURISDICTION

Petitioner invoked the jurisdiction of this Court under Title 28, U.S.C.A., Section 1257(3). The Respondent denies that there is a substantial federal question presented for review by this Honorable Supreme Court.

QUESTION PRESENTED

Did the trial court err in holding that under the facts of the case the search of Petitioner's home was reasonable?

STATEMENT OF THE CASE

Respondent denies every assertion of fact in Peti-

tioner's brief except those specifically admitted herein or supported by the record.

This is a state criminal case in which the Petitioner was convicted of the offense of possession of marijuana in Criminal District Court No. 2 of Harris County, Texas. Punishment was assessed at ten years imprisonment.

Lt. Baker and Officers Strickland, Chavez, Stringfellow, Gray and Pollock, of the Narcotics Squad of the Houston Police Department, armed with a search warrant, went to the residence of Petitioner in Houston, Harris County, Texas on the night of September 14, 1961.

Officer Strickland testified that he, Officer Gray, Officer Pollock and Lieutenant Baker went to the front of the house and the Officers Chavez and Stringfellow went to the rear of the house. (S.F. p. 41) Officer Strickland testified that he could see the light was on in the living room, and he could see Petitioner and his wife sitting on the couch in the living room. Officer Strickland further testified that he walked upon the front porch and opened the screen, which was not locked. He knocked on the wooden door and a male voice said "come in." (S.F. p. 41) Officer Strickland then opened the unlocked door, entered the house, identified himself to Petitioner and his wife and presented the search warrant to Petitioner. After Petitioner, and then his wife, had read the search warrant the officers started a search of the premises.

Officers Pollock and Stringfellow corroborated Officer's Strickland's testimony although Officer Pollock was unable to hear Officer Strickland knock on the door or Petitioner's invitation to enter because he was not in the proximity of the front door.

Officer Pollock testified that Officer Strickland was the first to enter the house and that he was the last to enter the house and was about twenty feet behind Officer Strickland when Strickland entered the house. He further testified that it was dark and that he could not see or hear anybody knock. (S.F. p. 24.)

Officer Stringfellow testified that he and Officer Chavez approached the house from the rear. He further testified that when he got to the back door he could see into the house and Officer Strickland was in the living room. He then entered the kitchen through the back door which was unlocked and open and he then began to search the kitchen. (S.F. pp. 55, 56.) He was not questioned as to whether or not he heard a knock on the door or an invitation to enter.

Neither Petitioner nor his wife testified but Petitioner called Lieutenant Baker as a witness. He stated that Officer Strickland was the first person on the premises. He was off the porch when Strickland entered the house and he did not hear Petitioner or anybody on the inside say anything and did not remember whether or not Officer Strickland knocked on the door. (S.F. pp. 71-73) He further testified that Officer Strickland told Petitioner that they were police officers at about the time the door opened (S.F. pp. 68-69), and that Petitioner invited Strickland to come into the house. (S.F. p. 73)

The Petitioner offered no further defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States reads as follows:

"The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 9 of Article 1 of the Constitution of the State of Texas reads as follows:

> "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

Article 319, Vernon's Code of Criminal Procedure of the State of Texas, reads as follows:

> "The officer shall, upon going to the place ordered to be searched, or before seizing any property for which he is ordered to make search, give notice of his purpose to the person who has charge of, or is an inmate of, the place, or who has possession of the property described in the warrant."

Article 321, Vernon's Code of Criminal Procedure of the State of Texas, reads as follows:

> "In the execution of a search warrant, the officer may break down a door or a window of any house which he is ordered to search, if he can not effect an entrance by other less violent means; but, when the warrant issues only for the purpose of discovering property stolen or otherwise obtained in violation of the penal law, without designating any particular place where it is supposed to be concealed, no such authority is given to the officer executing the same."

ARGUMENT

This is not, as Petitioner would infer, a case in which the officers broke down the door and came barging in or in any way entered the home of the Petitioner without the formalities usually preceding entry into the house of another. The uncontroverted evidence shows that the officer serving the search warrant knocked on Petitioner's front door and was told to "come in" before he entered.

Generally, the test to be applied in determining whether a search and seizure is unreasonable and violative of the accused's constitutional rights is whether the thing done in sum of its form, scope, nature, incidents and effects impresses the mind as being fundamentally unfair or unreasonable in the specific situation, when the immediate end sought is considered against the private right affected: *Schermmer v. U.S.*, 232 F. 2d 855, 10 C.A. 8th, 1956, cert. den., 352 U.S. 833, 77 S. Ct. 48, 1 L. Ed. 2d 52; *Oliver v. U.S.*, 239 F. 2d 818.

Officer Strickland, armed with a search warrant, had unquestioned authority to go to Petitioner's porch and knock on the door. When Petitioner invited him to come in, although he did not know the police were present, the officers were entitled to enter.

In discussing the question of probable cause, the standard of which is akin to that of reasonableness, the California Court held in *People v. Tabor*, 193 Cal. App.2d 779, 14 Cal. Rptr. 610:

> "It is well established in our law that in determining the question, the court looks only at the facts and circumstances presented to the officer at the time he was required to act."

The Fourth Amendment to the Constitution of the United States, supra, and its state counter part, Tex. Const., Art. I, Sec. 9, condemns only those searches and seizures which are unreasonable. *Harris v. U.S.*, 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399. A search is reasonable if conducted pursuant to a properly executed legal search warrant, by consent, or incident to a lawful arrest. *People v. Loria*, 223 N.Y.S.2d 462.

Thus it is the Constitution which guarantees protection against unreasonable search and seizure, but it is the statutes, state and federal, which define the limits beyond which police officers may not transgress in the arrest of an individual or the search of himself or of his property.

The reasonableness of a search is to be determined by an analysis of the facts and circumstances of the case at bar—"The total atmosphere of the case." *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L. Ed. 653, (1950). Can there be any other conclusion than that considering the "total atmosphere" of the case at bar, the facts and circumstances attending the officer's entry, establish the reasonableness of the search and seizure incident thereto.

Officer Strickland, authorized by warrant, was invited into the Petitioner's home by a male voice which said, "come in." (S.F. p. 41.) No deceit or trickery was used to gain admittance. Officer Strickland fully satisfied all constitutional requirements both federal and state as well as the statutory law of Texas, having been admitted to the Petitioner's home under the circumstances stated, he promptly identified himself to Petitioner and his wife and exhibited the warrant to Petitioner and his wife to examine before undertaking the search authorized by it. Since there was no forceful

entry, neither Article 321 of the Texas Code of Criminal Procedure, supra, nor Section 3109 of Title 18 of the United States Code, supra, nor *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332, relied upon by Petitioner is applicable. No objection was made to the officer's entry nor was it gained by ruse or trick. Neither is it claimed that entry was gained by duress or coercion. There is, therefore, no ground for suppressing the fruits of the search.

In the now historic and far-reaching decision of this Honorable Court in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, the Court held that constitutional due process and the right to privacy requires exclusion in both federal and state courts of any evidence obtained in an unreasonable search whether it was carried out by federal officers or state officers.

The majority opinion in *Mapp v. Ohio*, supra, specifically pointed out that reasonableness is in the first instance for the trial court to determine, citing *United States v. Rabinowitz*, supra. It had previously been emphasized in *Harris v. United States*, supra, that only unreasonable searches and seizures come within the interdict of the Fourth Amendment and that each case is to be decided upon its own facts and circumstances.

Petitioner would extend the holding of *Mapp v. Ohio*, supra, to a requirement that state courts look to federal statutes rather than to their own statutes to determine the reasonableness of a search.

The Superior Court of Pennsylvania was recently called upon in the case of *Commonwealth v. Richards*, 198 Pa. Super. 39, 182 A.2d 291, (1962), to determine what judicial discretion the State of Pennsylvania maintained in the light of *Mapp v. Ohio*, supra. There-

in in a learned opinion, Judge Rhodes, President Judge, stated:

> "The decision in Mapp v. Ohio, supra, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, must be read and interpreted in the light of the actual holding therein of the Supreme Court of the United States. It was there admitted that the evidence in question had been illegally obtained as the result of an unreasonable search under the laws of the State of Ohio. In the Mapp case the Supreme Court of the United States ruled that the evidence obtained as the result of an unreasonable search and seizure cannot be used, under the Fourteenth Amendment to the Constitution of the United States, as a basis for conviction in state or federal courts. The Mapp decision did not, as we interpret it, preclude judicial determination of what constitutes a reasonable search and seizure under all the circumstances. Cf. People v. Tyler, 193 Cal. App. 2d 728, 14 Cal. Rptr. 610, 613, (1961); State v. Valentin, 36 N. J. 41, 174 A. 2d 737, 738 (1961). As we view it the Mapp decision went no further than to hold that, where the search and seizure were unreasonable under all the circumstances, evidence obtained thereunder must, under the Fourteenth Amendment, be excluded in state criminal prosecutions. Not all searches and seizures are prohibited, those which are reasonable not being forbidden. 79 C.J.S. Searches and Seizure, Section 8, page 786."

In *People v. Tyler*, 193 Cal. App. 2d 779, 14 Cal. Rptr. 610, cited by the Pennsylvania Court in *Commonwealth v. Richards*, supra, the California Court stated:

> "We find nothing in Mapp v. Ohio, supra, to indicate that as a result of that decision the states are bound to follow the federal requirements of reasonable and probable cause instead of their own."

The Honorable Nathan R. Sobel, Judge, Supreme Court, King County, New York, was author of a very learned discussion of the new horizons confronted by the states as a result of *Mapp v. Ohio*, supra, in the September, 1961 edition of *The Pleader* entitled "The Law of Search and Seizure." Judge Sobel stated therein at page 12:

> "Mapp has of course, as applied to the states, removed much of the vagueness of the Due Process Clause by making the Fourth Amendment the standard. But nevertheless it has left broad discretion within constitutional limits, to the states. For as noted later herein, the reasonableness of a search may turn upon the lawfulness of an arrest. Federal arrest statutes are in many respects different from state arrest statutes. Thus a federal search may be 'unreasonable' by virtue of an unlawful arrest under a federal statute. But the same search may be perfectly reasonable by state arrest standards"

Neither *Miller v. United States*, supra, Section 3109 of Title 18, United States Code, nor any other Act of Congress or any rule of law promulgated by any court lays down a federal rule for search by state officers for violation of state law except that the search must be reasonable within the dictates of the Fourth Amendment. No federal statute nor any court decision purports to supersede state measures of determination of reasonableness of the search of the case at bar made by police officers of the City of Houston, Texas, for the violation of a criminal statute of the State of Texas.

Texas Courts have long held that evidence obtained by an unreasonable search and seizure must be excluded from evidence. *Giles v. State*, 112 S.W. 2d 473; *Vinson v. State*, 137 S.W. 2d 1048; *Gonzales v. State*, 187 S.W. 2d 940; *Stevens v. State*, 262 S.W. 2d 716; *Townsley*

v. State, 267 S.W. 2d 410; *Giacona v. State*, 298 S.W. 2d 587; *Helton v. State*, 300 S.W. 2d 87.

In *Williamson v. State*, 244 S.W. 2d 202, (1951), the Court of Criminal Appeals stated after holding that the conviction must be reversed:

> "In view of another trial, the testimony touching the search of appellant's room should not be received. It was her private residence and came under the protection prohibiting unreasonable searches and seizures. Giles v. State, 133 Tex. Cr. R. 454, 112 S.W. 2d 473. It must be remembered that the law does not authorize the search of one's private residence upon probable cause."

While the Texas Courts have held that evidence obtained by an unreasonable search and seizure cannot be admitted they have applied Texas Statutes and the interpretation of those statutes in determination of the reasonableness of the search.

In the case at bar the Texas Court of Criminal Appeals in affirming the judgment of the trial court cited *McCown v. State*, 338 S.W.2d 732, cert. den. 368 U.S. 856, 82 S.Ct. 96.

In the *McCown* case, supra, two officers of the Houston Police Department testified that, armed with a serach warrant, they went to the defendant's apartment house for purposes of a narcotics investigation. Both officers testified that they knocked on the door and waited for a time estimated from 40 seconds to 2 to 3 minutes but that the occupants failed to respond to their knocks and an entry was forced.

In affirming the conviction and in disposing of defendant's contention that the search warrant was illegally executed the court stated:

"The relevant statutes are Article 321 Vernon's Ann. C.C.P., which provides that an officer may break down a door in order to execute a search warrant 'if he cannot effect an entrance by other less violent means;' and Article 319, supra, which provides that, 'The officer shall, upon going to the place ordered to be searched, *or before seizing any property for which he is ordered to make search*, give notice of his purpose. . . .' (Italics the Court's)

"We find nothing in the cases cited by appellant which would require us to find the instant search illegally executed, nor do we find any expression of the Supreme Court in Miller v. United States, 357 U.S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (not cited), at variance with the conclusion we here reach that the search warrant was executed in compliance with the controlling Texas statutes. The facts in support of such conclusion are set forth above in the statement of the case."

Petitioner contends that under the provisions of Article 727a, Vernon's Texas Code of Criminal Procedure, the Texas Courts may no longer apply the standards of Article 319, Vernon's Texas Code of Criminal Procedure, supra, or Article 321, Vernon's Texas Code of Criminal Procedure, supra, but must ignore the Texas statutes and abide by Title 18, Section 3109, United States Code.

The contention is without merit. It not only is against the total weight of authority which Respondent has attempted to present in some manner of logical sequence, but it is frivolous in that it would require the court to preclude the States from a judicial determination of what is reasonable under all of the circumstances. This Honorable Court has not only refused to so hold, but has specifically held otherwise in *Mapp v. Ohio*, supra, *Harris v. United States*, supra, and *United States v. Rabinowitz*, supra.

It is of interest to note the language in the majority opinion in *Miller v. United States*, supra, where at pages 305 and 306 the Court applies the law of the District of Columbia.

It is therein stated:

> "This Court has said, in similar circumstances of an arrest for violation of federal law by state officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law. United States v. Di Re, 332 U.S. 581, 589, 68 S. Ct. 222, 92 L. Ed. 210; Johnson v. United States, 333 U.S. 10, 15, 68 S. Ct. 367, 92 L. Ed. 436. By like reasoning the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia."

Respondent would urge that in light of the above language quoted from *Miller v. United States*, supra, by like reasoning the validity of the search of Petitioner's home for violation of state law by state officers is to be determined by state law.

After determining that the law of the District of Columbia would apply in arresting Miller without a warrant, the Court proceeded in the next paragraph at page 306 to interpret that law, based upon a concession of the Government that the law in question, the same being Section 3109 of Title 18, United States Code, was applicable.

It is earnestly submitted by the Respondent that the decision in *Miller v. United States*, supra, is not, as Petitioner would urge, of Constitutional dimension. The decision was limited to an interpretation of a federal statute and not the Fourth Amendment. Respondent would further support his contention that the holding in *Miller v. United States*, supra, was a statutory

interpretation and not an interpretation of the Fourth Amendment of the Constitution by the language in the dissenting opinion of Mr. Justice Clark with whom Mr. Justice Burton concurred, wherein he stated:

> "I agree that a requirement of prior notice of authority and purpose should not be given a 'grudging' application. But by the same token it should not be reduced to an absurdity. A majority of the Court of Appeals has concluded that petitioner, at the time the police entered his apartment, 'already fully understood who the officers were and that they sought to arrest him.' 100 App. DC 302; 244 F. 2d 750, 758. The entry, therefore, was held valid under District of Columbia law. This Court now superimposes upon the local rule of the District an artificial and unrealistic requirement that, even under the circumstances found here, police must make 'an express announcement' in unmistakable words that they are the police and have come to make an arrest.
>
> "The Court attempts to justify interference in local law by what it terms a 'concession' of the Government that validity of the entry must be tested by a federal statute relating to forcible entry to execute a search-warrant. But the fact that the Government seeks clarification of a general federal statute, possibly to serve its purposes in prosecutions elsewhere, is no reason for us to oblige, especially when the result is to subvert existing local law. . . ."

CONCLUSION

Respondent urges the Court that the reasonableness of the search in the case at bar, must, under all authority be determined by the laws of the State of Texas. That based upon an application of the facts of the case at bar to Article 319, Code of Criminal Procedure and Article 321, Code of Criminal Procedure, there can be no question but that the trial court correctly held and the Court of Criminal Appeals rightly affirmed that the search of Petitioner's home was reasonable and not prohibited under either the Fourth Amendment to the Federal Constitution or its counterpart, Article I, Section 9 of the Constitution of the State of Texas.

Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WAGGONER CARR
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SAM R. WILSON
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General

ALLO B. CROW, JR.
Assistant Attorney General

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Allo B. Crow, Jr. Assistant Attorney General, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned case, in behalf of Respondent; I do further certify that copies of the foregoing brief have been forwarded by United States Mail, First Class, Postage-prepaid to Buck C. Miller, 407 Scanlan Building, 405 Main Street, Houston 2, Texas, Attorney for Petitioner.

Allo B. Crow, Jr.
Assistant Attorney General
Capitol Station
Austin, Texas

Attorney for Respondent